U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 March 2003

Case No. 2001-BLA-644

In the Matter of:
FRED L. RUNYON,
Claimant,

v.

DOTCO ENERGY COMPANY,
Employer,
and
A.T. MASSEY, Self-Insured,
Carrier,

and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:
Joseph Wolfe, Esq.
Norton, Virginia
For Claimant

Natalie Brown, Esq.
Lexington, Kentucky
For Employer/Carrier

BEFORE: THOMAS F. PHALEN, JR.
Administrative Law Judge

DECISION AND ORDER - DENIAL OF BENEFITS

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, ("the Act") and the regulations thereunder, located in Title 20 of the

Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.[1]

Procedural History

Fred Runyon ("Claimant") filed an application for benefits under the Act on March 4, 1994. (DX 1). On October 9, 1996, Administrative Law Judge Michael Lesniak issued a decision and order awarding benefits. (DX 44). He determined that Mr. Runyon was engaged in coal mine employment for 25 years, that he suffered from pneumoconiosis arising out of coal mine employment, and that he was totally disabled based on Mr. Runyon's testimony. The Benefits Review Board ("Board") reversed Administrative Law Judge Lesniak's finding of total disability on September 24, 1997, ruling that a finding of total disability cannot be based solely on a claimant's testimony. (DX 49). On November 20, 1997, the Board denied Mr. Runyon's timely request for modification. (DX 51). Mr. Runyon filed a request for modification on November 20, 1997, which was denied by the Director, Office of Workers' Compensation Programs ("OWCP") on April 7, 1998. (DX 58). Mr. Runyon requested a hearing on April 10, 1998, and the OWCP again issued a decision denying modification on June 30, 1998. (DX 59, 60). Again, Mr. Runyon requested modification, and his claim was transferred to the Office of the Administrative Law Judges on October 5, 1998 for a hearing. (DX 61, 63).

Administrative Law Judge Robert Hillyard issued a decision and order denial of benefits on August 19, 1999. (DX 79). Administrative Law Judge Hillyard found that Dotco Energy Company ("Employer") was collaterally estopped from raising the issues of pneumoconiosis arising out of coal mine employment. He credited Mr. Runyon with 16 and ½ years of coal mine employment, but he found that Mr. Runyon did not establish total disability. Mr. Runyon filed an appeal of Administrative Law Judge Hillyard's decision with the Board on September 7, 1999. (DX 80). Mr. Runyon filed a request for modification with the OWCP on December 8, 1999. (DX 85). Accordingly, the Board remanded Mr. Runyon's claim to the OWCP on December 17, 1999. (DX 85). On March 29, 2000, the OWCP issued a proposed decision and order denying request for modification. (DX 85). Mr. Runyon appealed the denial of his request for modification on April 22, 2000. (DX 85). Following an informal conference on August 10, 2000, the OWCP issued a memorandum of informal conference on January 5, 2001 finding that Mr. Runyon was totally disabled due to pneumoconiosis, after invoking the irrebuttable presumption of complicated pneumoconiosis, and awarded Mr. Runyon benefits. (DX 85). Dotco Energy filed an appeal on January 22, 2001, and requested a hearing before the Office of the Administrative Law Judges. (DX 85). The OWCP issued a proposed decision and order - supplement to memorandum of conference finding that Mr. Runyon's benefits should be

[1]The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

augmented by his two dependents, Carol and Angel. (DX 85). Dotco Energy appealed the OWCP's supplemental order on March 5, 2001, and again requested a hearing before the Office of the Administrative Law Judges. (DX 85). Dotco Energy declined to pay interim benefits, and Mr. Runyon began receiving Black Lung Benefit payments from the Disability Trust Fund on May 15, 2001. (DX 85).

On April 5, 2001, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a hearing. (DX 86).[2] A formal hearing on this matter was conducted on May 22, 2002, in Pikeville, Kentucky by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call and to examine and cross examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES

The issues in this case are:

1. Whether the Miner worked at least 25 years in or around one or more coal mines;

2. Whether the Miner has pneumoconiosis as defined by the Act;

3. Whether the Miner's pneumoconiosis arose out of coal mine employment;

4. Whether the Miner is totally disabled;

5. Whether the Miner's disability is due to pneumoconiosis; and

6. Whether the evidence establishes a change in conditions and/or that a mistake was made in the determination of any fact in the prior denial per 20 C.F.R. 725.310.

(DX 86).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[2]In this Decision, "DX" refers to the Director's Exhibits, "EX" refers to the Employer's Exhibits, "CX" refers to the Claimant's Exhibits, and "Tr" refers to the official transcript of this proceeding.

Background

Claimant was born on August 29, 1947. (DX 1). He completed the seventh grade and started the eighth grade. (Tr. 26). On September 23, 1968, he married Carol (Chapman) Runyon. (DX 7). They have one daughter, Angel Runyon, who was born on November 8, 1979. (DX 8). Claimant testified that his daughter is no longer dependent on him in any way since she graduated from college in May of 2002. (Tr. 32). I find that Claimant's wife, Carol Runyon, is a dependent for the purposes of augmentation. *See* § 725.205. However, I find that Angel Runyon ceased being a dependent in May 2002, as she is no longer a full-time student and she is 23 years old. *See* § 725.209.

Claimant testified that he experiences shortness of breath on exertion, dizzy spells, and headaches. (Tr. 27). He testified that he currently uses inhalers, and that he had not been treated for any heart problems since 1993. (Tr. 33). Claimant also takes pain medication symptomatically for the nerve that extends down his hip. (Tr. 33).

Responsible Operator

Liability under the Act is assessed against the most recent operator which meets the requirements of §§ 725.494 and 725.495. The District Director identified Dotco Energy Company as the responsible operator. (DX 27). Dotco Energy Company is the employer with whom Claimant spent his last cumulative one year period of coal mine employment and is properly designated as the responsible operator in this case. *See* § 725.493(a)(1).

Length of Coal Mine Employment

Claimant was a coal miner within the meaning of § 402(d) of the Act and § 725.202 of the regulations. The burden of proof in establishing the length of coal mine employment is on Claimant. *Shelesky v. Director,* OWCP, 7 B.L.R. 1-34 (1984); *Rennie v. United States Steel Corp.*, 1 B.L.R. 1-859 (1978). An Administrative Law Judge may consider the length of a miner's coal mine employment set forth in an affidavit, despite the hearsay character of the evidence . *Clayton v. Pyro Mining Co.*, 7 B.L.R. 1-551 (1984); *Williams v. Black Diamond Coal Mining Co.*, 6 B.L.R. 1-26 (1984).

Claimant testified that he began working in a coal mine in 1968 or 1969 by loading coal by hand in a mine owned by his brothers. (Tr. 17). Claimant also testified that he worked for Loftus Coal, Calf Branch Coal, Green Valley Coal, and then for Employer from 1980 to 1989. (Tr. 22). He then worked for Crystal Springs Coal, Conakay Resources, and Big Branch Resources, before returning to Employer from February 1993 to June 1993. (Tr. 22, 23). He has not held gainful employment since June 1993. (Tr. 32). During his years of coal mine employment, Claimant testified that he spent 99.99% of his time working at the face areas. (Tr. 23). He operated a continuous miner, a cutting machine, a loading machine, and other equipment. (Tr. 24). Claimant testified that he became a section foreman in 1975, which required him to work at the face of the

coal extraction process. When a member of his team was off, he was required to perform the work of the missing person. (Tr. 24). Claimant testified that he was last employed on a third-shift deadwork crew, who performed coal production for the first half of the shift and then dead work cleaning for the last part of the shift. (Tr. 25). He stated that he sat for 2 hours a day and crawled ½ to 3/4 of a mile for five hours a day. (DX 6). Claimant also described various manual labor tasks that he performed during his shift. (DX 6). He alleges 25 years of coal mine employment. Administrative Law Judge Lesniak credited Claimant with 25 years of coal mine employment, while Administrative Law Judge Hillyard credited Claimant with 16 and ½ years. Employer concedes that Claimant was employed for 16 and ½ years.

The record contains several letters from coal mines where Claimant was employed. A letter from Crystal Springs, Inc. establishes that Claimant was employed there from June 19, 1989 through April 10, 1991, and then again from June 17, 1991 through July 11, 1991. (DX 3). A letter from Dotco Energy shows employment from December 15, 1980 through May 24, 1989, and then again from February 1, 1993 through June 9, 1993. (DX 3). Conakay Resources employed Claimant from October 1, 1991 to April 30, 1992, and then from July 8, 1992 through October 31, 1992. (DX 3). The record also contains Claimant's W-2 forms from 1976 through 1993, excluding 1983, 1984, and 1986. (DX 4).

Under the amended regulations, the Department has adopted the 125-day rule for calculating length of coal mine employment. The provisions at § 725.101(a)(32)(iii) provide the following in the event that the fact-finder cannot ascertain the beginning and ending dates of a miner's employment:

> (iii) If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table shall be made part of the record if the adjudication officer uses this method to establish the length of the miner's work history.

§ 725.101(a)(32)(iii).

Although Claimant testified at length in regard to the various coal mine employers for whom he worked, he was unable to provide exact starting and ending dates for most of his employers. Accordingly, I have prepared the following table based on the available W-2 statements and the table referred to in § 725.101(a)(32)(iii), which is attached hereto as Exhibit ALJ-1, to aid in determining the length of Claimant's coal mine employment.

Company	Year	Miner's Yearly Income for the Company	Coal Mine Industry's Average Daily Earnings for that year	Days of Completed Coal Mine Employment	Years of Completed Coal Mine Employment
Green Valley	1976	$2,565.62	$64.07	40.04	.32
Tab Coal Co	1976	1,020.00	64.07	15.92	.12
Calf Branch	1976	16,230.00	64.07	253.31	1
Tab Coal Co	1977	180.00	71.90	2.5	.02
Green Valley	1977	10,640.23	71.90	147.98	1
Adair Mining	1978	2,883.69	80.31	35.90	.28
Max-Ann Coal Co	1978	8,419.86	80.31	104.84	.83
Green Valley	1978	200.00	80.31	2.4	.01
Green Valley	1979	22,046.64	87.03	253.32	1
Mullin Creek	1979	7,285.60	87.03	83.71	.66
Teresa Coal	1980	100.00	87.42	1.14	.009
Calf Branch	1980	15,550.00	87.42	177.87	1
Mullin Creek	1980	15,260.32	87.42	174.56	1
Dotco Energy	1981	43,415.00	96.80	448.5	1
Dotco Energy	1982	40,515.00	101.59	398.8	1
Dotco Energy	1985	43,854.55	122.00	359.46	1
Dotco Energy	1987	47,241.12	126.00	374.9	1
Dotco Energy	1988	46,320.08	127.52	363.23	1
Dotco Energy	1989	19,756.13	130.00	151.97	1
Crystal Springs	1989	15,350.25	130.00	118.07	.94
Crystal Springs	1990	29,048.69	133.68	217.3	1

Conakay Resources	1991	10,966.16	136.64	80.25	.64
Big Hickory	1991	4,169.71	136.64	30.51	.24
Crystal Springs	1991	14,780.85	136.64	108.17	.86
Dynasty Resources	1991	1,521.26	136.64	11.13	.08
Rocky Hollow	1991	5,636.50	136.64	41.25	.33
Big Branch	1992	5,625.00	137.60	40.87	.32
Alma Ridge	1992	2,081.25	137.60	15.12	.12
Preparation Maintenance	1992	504.00	137.60	3.66	.02
Grace Coal	1992	336.00	137.60	2.44	.01
Conakay Resources	1992	28,764.81	137.60	209.04	1
Dotco Energy	1993	13,121.25	138.08	95.02	.76
Big Branch	1993	3,217.50	138.08	23.3	.18
Total Years					**14.94**

I find the sworn testimony of Mr. Crawford to be generally credible regarding the length of his coal mine employment. Employer has not put forth any evidence to contradict Claimant's testimony. The record does not contain Claimant's Social Security Earnings records, so there is no indication of substantial non-coal mine employment that would contradict his testimony. Claimant's W-2 wage statements, used in conjunction with his sworn testimony and the additional evidence in the record, provide the most accurate accounting of the length of his coal mine employment. His W-2 statements show coal mine employment of 14.94 years. The letter from Employer supports a finding that Claimant was employed full-time for the years of 1983, 1984, and 1986. I credit Claimant with 3 additional years of coal mine employment for those years. Claimant listed employment from 1969 to 1970 with Runyon & Blackburn Coal Company and from 1970 to 1975 with Loftis Coal Company. (DX 2). A coal mine employment form alone, even if it is not corroborated, may be the basis for a finding of length of coal mine employment. *See Harkey v. Alabama By-Products Corp.*, 7 B.L.r. 1-26 (1984). I credit Claimant

with 6 additional years of coal mine employment from 1969 to 1975. Therefore, I find that Mr. Crawford was engaged in employment in or around one or more coal mines for a period of not less than 23.94 years.

MEDICAL EVIDENCE

X-RAY REPORTS

Exhibit	Date of X-ray	Date of Reading	Physician/Qualifications	Interpretation
DX 50		6/14/78	Lamonica	CWP
DX 16	7/03/91	5/05/94	Poulos, BCR[2], B-reader[3]	negative
DX 54	8/31/94	1/12/98	Sargent, BCR, B-reader	1/1
DX 50	9/17/93	9/17/93	Musgrave	2/2; A large opacities
DX 55	9/17/93	1/12/98	Sargent, BCR, B-reader	1/1
DX 38	2/11/94	2/11/94	Dineen, B-reader	1/1
DX 18	5/24/94	5/29/94	Vuskovich, B-reader	1/1
DX 12	5/25/94	5/25/94	Fritzhand	CWP
DX 17	5/25/94	5/25/94	Halbert, BCR, B-reader	1/2
DX 15	5/25/94	6/14/94	Sargent, BCR, B-reader	1/2
DX 37	3/09/96	3/10/96	Dahhan, B-reader	1/1
DX 65	9/12/98	9/13/98	Dahhan, B-reader	½

[2]A physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

[3]A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.5l) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

DX 66	9/12/98	1/4/99	Wheeler, BCR, B-reader	1/0
DX 70	9/14/98	9/14/98	Haven	fibronodular pattern involving mid and upper lung zones; interstitial rather than granulomatous
DX 85	10/22/99	10/26/99	DePonte, BCR, B-reader	3/2; A large opacities; film quality 1; ax
DX 84	10/22/99	1/10/00	Sargent,	Unreadable
DX 85	10/22/99	02/21/00	Aycoth, BCR, B-reader	2/2; A large opacities; film quality 1
DX 85	10/22/99	2/25/00	Cappielio, BCR, B-reader	2/2; A large opacities; film quality 2; coalescence of opacities bilaterally
DX 85	10/22/99	4/07/00	Barrett, BCR, B-reader	2/3; A large opacities; film quality 2; ax
DX 85	10/22/99	4/18/00	Scott, BCR, B-reader	2/1; film quality 1; possible few calcified granulomata changes in 2B could be Tb or silicotuberculosis
DX 85	10/22/99	4/18/00	Wheeler, BCR, B-reader	1/0; film quality 1[4]
DX 85	10/22/99	9/12/00	Wiot, BCR, B-reader	2/2; film quality 1; ax
EX 1	10/22/99	4/03/01	Fino, B-reader	2/2; some coalescence in right & left upper zones; 0 large opacities

[4]Dr. Wheeler commented that TB or silicotuberculosis of unknown activity, probably healed with: moderate nodular infiltrate rul and apex and minimal nodular infiltrate in both mid lungs mixed with few linear scars including one extending to left lateral pleural. Probable few small calcified granulomata in both lungs. Minimal obesity. Suggest CT scan for exact localization of nodules because the pattern is assymetrical and involves right apex which strongly favors TB over pneumoconiosis. Some of the nodules could be silicosis or CWP, but the major portion is granulomatous disease.

EX 10	10/22/99	4/25/01	Spitz, BCR, B-reader	2/2; bilateral coalescence of nodules; 0 large opacities
DX 85	3/21/00	3/21/00	Hippensteel, B-reader	2/2; some coalescence in RUZ and less so in LMZ that continue to show separation of nodules and therefore not indicative of large opacities
DX 85	3/21/00	6/01/00	Scott, BCR, B-reader	1/1; 0 large opacities
DX 85	3/21/00	2/13/01	Castle, B-reader	2/3; 0 large opacities; ax
DX 85	3/21/00	2/19/01	Dahhan, B-reader	2/1
DX 85	4/10/00	4/11/00	DePonte, BCR, B-reader	2/3; A large opacities; ax
DX 85	4/10/00	9/25/00	Cappielo, BCR, B-reader	2/2; A large opacities 1.5 cm in diameter; ax; emphysema
DX 85	4/10/00	9/29/00	Aycoth, BCR, B-reader	2/3; A large opacities
EX 13	7/13/01	10/18/01	Castle, B-reader	2/2; 0 large opacities
CX 5	7/13/01	7/27/01	DePonte, BCR, B-reader	2/3; B large opacities
EX 13	7/13/01	10/23/01	Hippensteel, B-reader	2/2; 0 large opacities
EX 13	7/13/01	10/29/01	Dahhan, B-reader	2/1; 0 large opacities
EX 15	10/15/01	10/15/01	McSharry, A-reader	2/3; 0 large opacities
EX 17	10/15/01	11/12/01	Scott, BCR, B-reader	1/1; 0 large opacities
EX 19	10/15/01	1/02/02	Castle, B-reader	2/2; 0 large opacities
EX 19	10/15/01	1/02/02	Hippensteel, B-reader	2/2; areas of coalescence with distinct nodules still visible; 0 large opacities
EX 22	10/15/01	1/9/02	Dahhan, B-reader	2/1; 0 large opacities

EX 22	10/15/01	1/10/02	Jarboe, B-reader	2/3; coalescence of nodules in right upper lung zone; 0 large opacities
EX 22	10/15/01	1/14/02	Fino, B-reader	2/2; 0 large opacities
EX 13	10/29/01	10/29/01	Dahhan, B-reader	2/1; 0 large opacities
EX 26	2/27/02	2/27/02	Dahhan, B-reader	2/2; 0 large opacities
EX 28	2/27/02	4/08/02	Castle, B-reader	1/2 ; 0 large opacities
EX 29	2/27/02	4/11/02	Wheeler, BCR, B-reader	1/0; 0 large opacities
EX 29	2/27/02	4/11/02	Scott, BCR, B-reader	1/1; 0 large opacities
EX 33	2/27/02	4/18/02	Repsher, B-reader	2/2; x-ray is atypical for CWP, must consider chronic granulomatous disease; 0 large opacities

PULMONARY FUNCTION STUDIES

Exhibit/ Date	**Co-op./ Undst./ Tracings**	**Age/ Height**	**FEV_1**	**FVC**	**MVV**	**FEV_1/ FVC**	**Qualifying Results**
DX 85[5]	/ / Yes	52 69"[6]	2.56 2.13*	2.73 2.68*	63 85	94% 79%	No No
EX 15 10/15/01	/ / Yes	54 68"	3.21 2.92*	3.86 3.39*	94	83% 86%*	No No
EX 26 2/27/02	Good/ Good/ Yes	54 69"	3.08	3.69	82	83%	No

*post-bronchodilator values

[5]Claimant was not able to exhale consistently or for more than 2 seconds before plateauing on spirometry. On best test there is no evidence of obstruction. FVC is invalid because of short expiration time. He could not hold his breath for diffusion test. He said that pain prevented him from doing lung volume test.

[6] I must resolve the height discrepancy recorded on the pulmonary function tests. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). I find that the miner's actual height is 69 inches.

ARTERIAL BLOOD GASES

Exhibit	Date	pCO_2	pO_2	Qualifying
DX 85	3/21/00	37.1	65.4	N/A
EX 15	10/15/01	36	76	
EX 26	2/27/02	33.1	83.9	

*Results obtained with exercise

CT Scans

Paul Francke, M.D., who is a board-certified radiologist, submitted Claimant to a CT scan on January 9, 1991. (EX 11). His impression was negative exam.

Barbara Lahr, M.D. interpreted a CT scan dated March 18, 1999. (DX 72). She detetcted and increased nodular pattern. Dr. Lahr also interpreted a CT scan dated March 22, 1999. (DX 70). She noted an increased interstitial nodular pattern diffusely and bilaterally, which was non-specific. Dr. Lahr recommended a routine CT of the chest.

Jerome Wiot, M.D., who is a board-certified radiologist, reviewed a CT scan dated August 30, 1999. He submitted a narrative report on April 24, 2001. (EX 5). Dr. Wiot detected multiple small nodules in the upper lobes with a few in the right middle lobe consistent with CWP. He detected coalescence of pneumoconiotic nodules on the right, but stated that there are no definite large opacities. Dr. Wiot summarized that the CT scan showed evidence of simple CWP.

Harold Spitz, M.D., who is a board-certified radiologist, reviewed a CT scan dated August 30, 1999, and issued a narrative report on May 3, 2001. (EX 5). Dr. Spitz detected extensive disease, primarily in the upper lobes, characterized by small nodular densities. He detected coalescence of nodules on the right side. Dr. Spitz stated his impression that the CT findings are consistent with simple CWP.

Narrative Medical Evidence

Nancy Munn, M.D. submitted correspondence dated January 7, 2000. (DX 85). Dr. Munn stated that Claimant had been treated in her pulmonary clinic for pulmonary symptoms. She accounted for Claimant's history of exposure to coal dust. Dr. Munn opined that a CT of Claimant's chest showed nodular interstitial infiltrates, which would be consistent with pneumoconiosis. Dr. Munn did not perform any pulmonary function testing.

Kirk Hippensteel, M.D., who is board-certified in internal medicine and the subspecialty of pulmonary disease, examined Claimant on March 21, 2000 and issued a narrative report on May 15, 2000 after conducting a review of Claimant's medical records. (DX 85). He considered a 25 year history of coal mine employment and a one year smoking history of small amounts in 1966.

He performed a chest x-ray, patient could not compete a pulmonary function test ("PFT"), and an arterial blood gas study which revealed mild hypoxemia. Claimant complained of breathing difficulty for the past 10 to 12 years, reported no history of tuberculosis, and occasionally has a cough productive of sputum that looks like it contains some coal dust, occasional streaks of blood, and occasional yellow color. Dr. Hippensteel opined that Claimant has evidence of simple, coal workers' pneumoconiosis ("CWP"), but that the specific chest x-ray findings are not present to indicate complicated pneumoconiosis. He found that Claimant has not developed a significant ventilatory dysfunction related to his CWP, but noted that Claimant's exact level of functioning could not be determined from his examination. He opined that Claimant has mild hypoxemia at rest, but was unable to determine if it was related to his coal mine employment. Dr. Hippensteel found that Claimant's post-traumatic stress disorder causes a stress reaction that accounts for Claimant's chest pain, which additive to his sciatic pain that runs from his back into his left hip. Dr. Hippensteel stated that his opinion following examination was confirmed after reviewing Claimant's medical records. He noted that Claimant has shown on several examinations since leaving coal mine employment that he can have normal pulmonary function, which shows that he developed no pulmonary impairment while working in the mines. Claimant has also shown normal gas exchange since leaving the mines, which is further evidence that he developed no impairment while in the mines. Dr. Hippensteel opined that his March 21, 2000 chest x-ray interpretation, which was corroborated by a high resolution CT scan from the year prior, shows that large opacities have not developed, despite Dr. DePonte's interpretation. Dr. Hippensteel opined that Claimant's medical problems, which are not related to coal mine employment, impair him as a whole man, prevent him from working, and now prevent him from even undergoing a valid PFT. Dr. Hippensteel opined that the mild resting hypoxemia is not indicative of disability due to coal mine employment because it was not fixed and permanent. He concluded, from a pulmonary standpoint alone, that Claimant has the pulmonary capacity to return to work as a coal miner.

Abdul Dahhan, M.D., who is board-certified in internal medicine and the subspecialty of pulmonary disease, issued a consultative report on April 30, 2001, after reviewing Claimant's medical records. (EX 3). Dr. Dahhan, based on his medical records review and his previous examination of Claimant, issued four conclusions. First, he found that Claimant suffered from simple CWP based on various x-rays and CT of the chest. Dr. Dahhan determined that there is no evidence of complicated pneumoconiosis, noting that: the clinical examination of Claimant's chest showed no abnormal findings, Claimant had normal spirometry, his alteration in his ABG at rest improves with exercise, and there is negative radiological data for the diagnosis of complicated pneumoconiosis. Third, Dr. Dahhan opined that Claimant retained the respiratory capacity to continue his previous coal mine work or that of comparable physical demand based on Claimant's ABGs, valid PFTs, and clinical examination of Claimant's chest. Lastly, he noted that Claimant has low back pain and peptic ulcer disease, which are unrelated to coal mine employment.

Dr. Fino issued supplemental consultative report on June 6, 2001, after reviewing additional medical records of Claimant. (EX 6). He opined that the additional medical information did not cause him to change any of his opinions. Dr. Fino noted that the mild

hypoxemia Claimant has demonstrated in the past is variable and does not worsen with exercise, which means that it does not support a finding of oxygen transfer impairment or disability. Dr. Fino then concluded that Claimant has simple CWP, that Claimant does not have complicated CWP, and that Claimant does not have a respiratory impairment or disability.

On June 7, 2001, James Castle, M.D., who is board-certified in clinical and anatomical pathology, issued a consultative report. (EX 7). Dr. Castle reviewed Claimant's medical records. He opined, based on his records review, which included physical examinations, radiographic reports, physiologic testiing, arterial blood gas studies and other data, that Claimant has radiographic evidence of simple CWP. He considered a 25 year coal mine employment history and the lack of a significant smoking history. He noted that Claimant never demonstrated consistent findings indicating the presence of an interstitial pulmonary process by physical examination since there was no consistent finding of rales, crackles, or crepitations. He referred to radiographic evidence that did not show the existence of complicated pneumoconiosis. Dr. Castle also pointed out that the valid PFTs showed no evidence of obstruction, restriction, or diffusion abnormality. He noted that the ABGs showed a minimal degree of resting hypoxemia, but his response improved with exercise. Dr. Castle opined that Claimant has no significant respiratory impairment related to CWP, nor from any other cause. He concluded that Claimant has the respiratory capacity to perform his previous coal mine employment.

Thomas Jarboe, M.D., who is board-certified in internal medicine and the subspecialty of pulmonary disease, also issued a consultative report on June 7, 2001. (EX 8). He reviewed his records from his prior examination and reports regarding Claimant, as well as Claimant's medical records. Dr. Jarboe concluded, from his review of the additional medical records, that there continues to be sufficient evidence to justify a diagnosis of simple CWP. However, he opined that there is not sufficient evidence to diagnose complicated pneumoconiosis, based on the high resolution CT scan of August 30, 1999. Dr. Jarboe also stated that he continues to feel that Claimant has no significant ventilatory impairment, based on completely normal PFT values and ABGs which show only occasional resting hypoxemia that improves with exercise. He concluded that there is no evidence of a totally and permanently disabling respiratory condition. Dr. Jarboe concluded that Claimant retains the functional respiratory capacity to perform his last coal mining job. However, he opined that Claimant is likely disabled as a whole man because he is overweight and has exertional chest discomfort, which is likely caused by coronary artery disease.

Dr. Hippensteel issued a consultative report on June 8, 2001. (EX 9). He reviewed his previous examination report and additional medical records of Claimant. He concluded that Claimant has evidence of simple CWP, but that there was no development of large opacities to a reasonable degree of medical certainty. Dr. Hippensteel opined that his radiographic conclusions are supported by the functional evidence in the record that shows that Claimant has no permanent ventilatory or gas exchange impairment from any cause. He noted that Claimant also suffers from post-traumatic stress disorder and degenerative disc disease, which causes pain in his back and lower extremities. Dr. Hippensteel stated that these non-pulmonary conditions render

Claimant totally disabled as a whole man. He saw no evidence of a specific deterioration in Claimant's lung function since his previous report.

Dr. Hippensteel was deposed on September 4, 2001. (EX 24). He reiterated the findings and conclusions contained in his prior opinions.

Roger McSharry, M.D. is board-certified in internal medicine, critical care medicine, and the subspecialty of pulmonary disease. He examined Claimant on October 15, 2001 and provided a narrative report. (EX 15). Dr. McSharry also reviewed additional medical records of Claimant. He performed a physical examination, PFT, ABG, and an EKG. He considered a 26 year coal mine employment history and a one year smoking history. Claimant complained of shortness of breath, exertional dyspnea, and chest tightness. Chest was clear to auscultation on physical exam. He interpreted the x-ray as positive for CWP, the PFT as showing no evidence of an obstructive lung disease, the ABG as revealing slight hypoxemia, and the EKG as normal. Dr. McSharry opined that Claimant suffered from CWP, noted that there were some areas on the x-ray of questionable coalescence, but he found no massive lesions. He opined that the completely normal PFT and relatively normal ABG indicate that Claimant has no respiratory impairment related to his CWP. He finds Claimant's pulmonary complaints to be somewhat atypical, and clearly, partially related to stress or anxiety. Dr. McSharry stated that Claimant appears to be able to perform his last coal mine job because there is no pulmonary disability. He found that his review of the medical records confirmed his findings. Dr. McSharry stated that another CT scan could clear the uncertainty as to whether Claimant suffers from complicated pneumoconiosis. He opined that if a repeat CT scan showed a 1 cm or greater nodule, he would change his opinion that Claimant does not suffer from complicated pneumoconiosis because the nodule would almost certainly be related to coal dust exposure and it would meet the criteria for complicated pneumoconiosis.

Dr. Dahhan issued a consultative report on December 26, 2001, after reviewing additional medical records of Claimant. (EX 20). He rendered four conclusions. First, Claimant has radiological findings sufficient to justify a diagnosis of category II, simple CWP. There are no objective findings to indicate complicated CWP; there are no clinical findings of crackles, the sensitive CT scan was negative for complicated CWP, and there is normal spirometry, lung volume, and diffusion capacity. There are no objective findings to indicate any functional respiratory impairment or disability. Lastly, Claimant retains the physiologic capacity to continue his previous coal mine employment.

Dr. Castle provided a consultative report dated January 2, 2002. (EX 20). He reviewed additional medical records of Claimant. Dr. Castle stated that his opinion remains unchanged that Claimant suffers from simple CWP, but not complicated pneumoconiosis, and that Claimant has no respiratory impairment from any cause.

Also on January 2, 2002, Dr. Fino provided another consultative report for the record after reviewing additional medical records of Claimant. He simply stated that a review of the additional medical records did not cause him to change any of his opinions.

Dr. Hippensteel added another consultative report to the record on January 3, 2002. (EX 20). He reviewed additional medical records of Claimant. He opined that the additional records corroborate the conclusions he reached after previously examining Claimant. Dr. Hippensteel stated that Claimant has evidence of simple CWP, that Claimant does not suffer from complicated pneumoconiosis, and that Claimant has the respiratory capacity to return to his last coal mine employment.

On January 4, 2002, Dr. Jarboe submitted another supplemental consultative report. (EX 23). He reviewed additional medical records of Claimant. Dr. Jarboe concluded that there continues to be radiographic evidence of simple CWP, but not complicated CWP. He also stated that he continues to feel that Claimant has no ventilatory impairment, pointing to the objective testing performed on October 15, 2001 that revealed normal ventilatory function. Dr. Jarboe finds no evidence of a totally and permanently disabling lung condition, but notes that Claimant is disabled as a whole person due to Claimant being overweight, chest discomfort likely caused by coronary artery disease, and back problems. He determined that Claimant maintained the respiratory capacity to perform his usual coal mine employment.

Dr. Dahhan examined Claimant on February 27, 2002 and issued a narrative report on March 6, 2002. (EX 26). He considered a smoking history of one pack per day for one year in 1966, as well as a coal mine employment history of 25 years. Claimant complained of daily cough with clear sputum, occasional wheezes, and dyspnea on exertion. Claimant was using a prescription Proventil inhaler, Ceftin for a respiratory infection, and a Medrol Pak. Physical examination revealed good air entry into both lungs, with no crepitation. Dr. Dahhan performed a chest x-ray, PFT, ABG, and an EKG. He opined that, overall, the objective studies showed normal respiratory mechanics with no evidence of restrictive obstructive ventilatory abnormalities. Dr. Dahhan also reviewed additional medical records of Claimant. He issued five conclusions based on his examination and review of the record. Claimant has CWP. Second, Claimant has no evidence of complicated pneumoconiosis, based upon the clinical exam and objective testing. Dr. Dahhan found that Claimant has no evidence of total or permanent pulmonary disability, based on the PFTs and ABGs. He also found that Claimant had the respiratory capacity to return to his previous coal mine employment. Lastly, Dr. Dahhan noted that Claimant had low back pain, which is not related to his coal mine employment.

On April 17, 2002, Dr. Hippensteel submitted his fourth consultative opinion after reviewing additional medical records of Claimant, which also supplements his two prior examination reports and his deposition testimony. (EX 31). Dr. Hippensteel believes that the additional medical records that he reviewed corroborate the conclusions that he reached in his previous reports.

The following day, on April 18, 2002, Dr. Castle issued another supplemental consultative report after reviewing additional medical records of Claimant. (EX 32). Dr. Castle opined that Claimant has evidence of simple CWP, but not complicated CWP. He considered Claimant's 25 years of coal mine employment and an insignificant smoking history. He noted that Claimant lacked any consistent physical findings to indicate the presence of an interstitial pulmonary process. Dr. Castle pointed out that all of the valid PFTs have been normal, including the most recent PFTs, and that the ABGs do not demonstrate a disabling abnormality of blood gas transfer. He concluded that Claimant is not permanently and totally disabled due to CWP. Rather, he feels that Claimant retains the respiratory capacity to perform his previous coal mine employment. However, Dr. Castle states that Claimant is totally disabled as a whole person due to obesity, chest pain, back problems, and post-traumatic stress disorder, all of which are unrelated to coal mine dust exposure.

Dr. McSharry issued a supplemental consultative report on April 19, 2002, after reviewing additional medical records of Claimant. (EX 35). Dr. McSharry found nothing in the additional medical records to change the opinion he stated in his report dated October 15, 2001.

Lawrence Repsher, M.D., who is board-certified in critical care medicine, internal medicine, and the subspecialty of pulmonary disease issued a consultative opinion on April 24, 2002, after reviewing extensive medical records of Claimant. (EX 33). He noted that Claimant worked as an underground coal miner for 25 years, with a smoking history of one to one-and-a-half packs per day from 1963 to 1966. Dr. Repsher opined that Claimant may have simple CWP with ax, but that there is no evidence of complicated CWP. He noted that Claimant has normal pulmonary functioning, with varying, although generally normal, arterial blood gases. Dr. Repsher points to EKG resultls suggesting the presence of underlying coronary artery disease. From a pulmonary standpoint, Dr. Repsher believes that Claimant can still perform his usual coal mine employment. He mentions that Claimant may be totally disabled due to low back pain and possible coronary artery disease.

Also on April 24, 2002, Dr. Fino rendered his eighth report regarding Claimant's condition. (EX 38). Dr. Fino reviewed additional medical records of Claimant. The records review did not cause Dr. Fino to change any of his opinions.

Dr. Jarboe issued another supplemental consultative opinion on April 26, 2002. (EX 39). He reviewed additional medical records of Claimant. Dr. Jarboe reiterated his prior findings and conclusions, and noted that the new evidence corroborated his opinions.

Dr. Dahhan was deposed on May 13, 2002. (EX 40). He reiterated the findings and conclusions contained in his prior reports. Dr. Dahhan testified that coalescence means that some of the lesions are getting close to each other, while complicated means there is a big mass present on the x-ray.

Dr. Repsher was deposed on May 10, 2002. (EX 43). He testified that the July 13, 2001

x-ray shows a shadow in the inferior portion of the right upper lung that does have the appearance of an A lesion of complicated pneumoconiosis. Dr. Repsher explained his opinion, that Claimant does not have evidence of complicated CWP, by attributing the shadow on the July 13, 2001 to x-ray technique since it does not appear on subsequent x-rays or CT scans. He also testified that ax is the abbreviation for coalescence of small nodules, small opacities. Dr. Repsher stated that the difference between ax opacities and A large opacities is that you can distinguish small rounded opacities in AX.

Dr. Castle was deposed on May 22, 2002. (EX 44). He identified axillary coalescence on the first x-ray of Claimant that he interpreted. Dr. Castle testified that axillary coalescence is the proximation of finite, small rounded opacities that occurs as they remain distinct; they do not form a mass, but they do appear to be in close proximity on an x-ray. He noted that axillary coalescence is not complicated pneumoconiosis. Dr. Castle also reiterated the findings and opinions contained in his prior reports.

DISCUSSION AND APPLICABLE LAW

Mr. Runyon's claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, the following elements:

1. That he suffers from pneumoconiosis;

2. That the pneumoconiosis arose, at least in part, out of coal mine employment;

3. That the claimant is totally disabled; and

4. That the total disability is caused by pneumoconiosis.

See §§ 719.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore,* 9 B.L.R. 1-4, 1-5 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-212 (1985). Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26, 1-27 (1987).

Modification

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. § 932(a) and as implemented by § 725.310, provides that upon Claimant's own initiative, or upon the request of any party on the ground of a change in conditions or because of a mistake in a determination of fact, the fact-finder may, at any time prior to one year after the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or a denial of benefits. § 725.310(a).

In deciding whether a mistake in fact has occurred, the United States Supreme Court stated that the Administrative Law Judge has "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). In determining whether a change in conditions has occurred requiring modification of the prior denial, the Benefits Review Board stated that,

> the Administrative Law Judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision.

Kingery v. Hunt Branch Coal Co., BRB No. 92-1418 BLA (Nov. 22, 1994); *See also Napier v. Director, OWCP*, 17 B.L.R. 1-111 (1993); *Nataloni v. Director, OWCP*, 17 B.L.R. 1-82 (1993). Furthermore,

> if the newly submitted evidence is sufficient to establish modification . . ., the Administrative Law Judge must consider all of the evidence of record to determine whether Claimant has established entitlement to benefits on the merits of the claim.

Kovac v. BNCR Mining Corp., 14 B.L.R. 1-156 (1990), *modified on recon.*, 16 B.L.R. 1-71 (1992).

This claim was filed in 1994, therefore, it must be adjudicated under the regulations at 20 C.F.R. Part 718. Accordingly, I will consider all of the prior evidence. If there is a mistake in determination of a fact or if the new evidence establishes a change in conditions, I will consider all of the evidence of record to determine whether the Claimant has established entitlement to benefits on the merits of the claim. *See Kovac,* 14 B.L.R. at 1-158.

Mistake in a Determination of Fact

The determination of whether the miner has complicated pneumoconiosis is a finding of fact, and the administrative law judge must consider and weigh all relevant evidence. *See Melnick v. Consolidation Coal Co.*, 16 B.L.R. 1-31 (1991). Administrative Law Judge Lesniak found, during a hearing on April 24, 1996, that Claimant had proven the existence of pneumoconiosis, but he did not specifically find in his decision and order - awarding benefits that Claimant suffered from complicated pneumoconiosis. There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if such miner is suffering from a chronic dust disease of the lung which:

> (a) When diagnosed by chest x-ray (see § 718.202 concerning the standards for x-rays and the effect of interpretations of x-rays by physicians) yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C . . .
>
> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lungs; or
>
> (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraphs (a) or (b) of this section had diagnosis been made as therein described: *Provided, however*, That any diagnosis made under this paragraph shall accord with acceptable medical procedures. (emphasis in original)

See § 718.304. I will evaluate the newly submitted evidence in accordance with the standards set forth by § 718.202 to determine if Claimant suffers from complicated pneumoconiosis.

The previously submitted x-ray evidence dates back to 1978. (DX 50). The record contains 14 interpretations of 10 previously submitted x-ray films. Thirteen of the interpretations were positive for the existence of pneumoconiosis. Dr. Musgrave interpreted an x-ray dated September 17, 1993 as positive for the existence of pneumoconiosis, and found the presence of A large opacities. No other interpretations presented findings of large opacities for that x-ray. There are 34 interpretations of 7 newly submitted x-rays. Of the newly submitted x-ray evidence, there were 33 positive findings of pneumoconiosis, which ranged in classification from 1/0 to 3/2. Additionally, there are five interpretations of four CT scans, four of which revealed the presence of simple CWP. Undoubtedly, Claimant suffers from a chronic dust disease of the lung. The remaining question is whether it is the type of lung disease that yields one or more large opacities.

Drs. DePonte, Aycoth, Cappielio, and Barrett, all of whom are dually certified as board-certified radiologists and B-readers, interpreted an x-ray dated October 22, 1999 as positive for the existence of pneumoconiosis with the presence of size A large opacities. Drs. Scott, Wiot, Spitz, and Wheeler, who are all also dually-certified physicians, interpreted the same film as positive for the existence of pneumoconionsis, but they did not find the presence of large opacities. Drs. Wiot and Spitz noted the axillary coalescence of distinct nodules, but Dr. Scott did not. Dr. Fino, a B-reader, interpreted the film as positive for the existence of pneumoconiosis, but did not find the presence of large opacities. Additionally, Dr. Sargent, also a dually-certified physician, found the film to be unreadable and did not issue an interpretation. The other nine physicians determined that the film was either quality 1 or 2. All of the interpretations were rendered in accordance with the standards required by § 718.304 and § 718.202. Nine out of ten physicians determined that the film quality was acceptable level to issue an interpretation from. Therefore, I find that this film is of sufficient quality to constitute evidence of the fact for which it is proffered. Four dually-certified physicians identified the existence of large opacities, while four

dually-certified physicians and one B-reader did not. The weight of the evidence is in equipoise. I find that Claimant has not established by the preponderance of the evidence that the x-ray dated October 22, 1999 shows the presence of large opacities.

Dr. Hippensteel, who is a B-reader, interpreted an x-ray dated March 21, 2000 as positive for the existence of pneumoconiosis. He noted the coalescence of nodules, but found that they were not indicative of large opacities because they continued to show separation. Dr. Scott found interpreted the film as positive for pneumoconiosis, but did not identify any large opacities, nor did he view any axillary coalescence. Also, Dr. Castle interpreted the film as positive for the existence of pneumoconiosis, he noted the presence of axillary coalescence, but he found no evidence of large opacities. Dr. Dahhan, who is a B-reader, similarly found the presence of pneumoconiosis, but did not identify any large opacities. In the four interpretations of the x-ray, there were no findings of large opacities. Therefore, I find that the x-ray dated March 21, 2001 does not show the presence of a chronic dust disease of the lung that yields one or more large opacities.

Drs. DePonte, Cappielo, and Aycoth all interpreted an x-ray dated April 10, 2000 as positive for the existence of pneumoconiosis and found the presence of A large opacities. There are no interpretations to the contrary. Therefore, I find that the x-ray dated April 10, 2000 shows the presence of a chronic dust disease of the lung that yields one or more large opacities classified as category A.

Dr. DePonte interpreted an x-ray dated July 13, 2001 as positive for the existence of pneumoconiosis and found the presence of B large opacities. Drs. Castle, Hippensteel, and Dahhan, all of whom are B-readers, found that the film was positive for the existence of pneumoconiosis, but they did not detect any large opacities. It is proper to credit the interpretation of a dually-certified physician over the interpretation of a B-reader. *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) (en banc on recon.). Dr. DePonte's interpretation, as a dually-certified physician, is entitled to greater weight than the interpretations of the three B-readers. Threrefore, I find that the x-ray dated July 13, 2001 shows the presence of a chronic dust disease of the lung that yields one or more large opacities classified as category B.

Drs. McSharry, Scott, Castle, Hippensteel, Dahhan, Jarboe, and Fino interpreted an x-ray dated October 15, 2001 as positive for the existence of pneumoconiosis, but they did not identify the presence of any large opacities. Again, Dr. Hippensteel, as well as several other interpretations, noted axillary coalescence. There are no contrary interpretations. Therefore, I find that the x-ray dated October 15, 2001 does not show the presence of a chronic dust disease of the lung that yields one or more large opacities.

Dr. Dahhan interpreted an x-ray dated October 29, 2001 as positive for the existence of pneumoconiosis, but did not identify the presence of any large opacities. There are no interpretations to the contrary. Therefore, I find that the x-ray dated October 29, 2001 does not show the presence of a chronic dust disease of the lung that yields one or more large opacities.

Drs. Dahhan, Castle, Wheeler, Scott, and Repsher interpreted an x-ray dated February 27, 2002 as positive for the existence of pneumoconiosis, but none of the interpretations identified the presence of large opacities. There are no interpretations to the contrary. Therefore, I find that the x-ray dated February 27, 2002 does not show the presence of a chronic dust disease of the lung that yields one or more large opacities.

I have determined that 2 of the 7 newly submitted films show the presence of one or more large opacities. There were 18 interpretations rendered by physicians who were dually-certified, 8 of those interpretations found the presence of one or more large opacities and 1 found the film unreadable. From the 15 B-reader interpretations, there were no findings of large opacities. There was one A-reader interpretation, which did not find the presence of large opacities. Thus, only 8 out of the 34 interpretations found large opacities. Many of the 26 interpretations that did not find large opacities pointed out the occurrence of axillary coalescence, which occurs when small nodules grow near to other small nodules, but maintain their own distinct shape.

It is within the discretion of an administrative law judge, but not required, to defer to the numerical superiority of the x-ray evidence. *See Wilt v. Wolverine Mining Co.*, 14 B.L. R. 1-70 (1990); *Edmiston v. F & R Coal Co.*, 14 B.L.R. 1-65 (1990). However, administrative fact-finders simply cannot consider the quantity of the evidence alone, without reference to a difference in the qualifications of the readers or without an examination of the party affiliation of the experts. *See Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993). Claimant adduced 8 interpretations of dually-certified physicians covering 3 x-rays. All 8 interpretations found the presence of large opacities. Employer adduced 26 interpretations of 6 x-rays from dually-certified physicians, B-readers, and an A-reader. None of the interpretations submitted by Employer found the presence of large opacities. The three most recent x-rays did not show the presence of large opacities. Claimant did not proffer any contrary interpretations to the three most recent films. Employer did not proffer contrary opinions to the interpretations of the April 10, 2001 x-ray adduced by Claimant. The radiographic evidence weighs against a determination of complicated pneumoconiosis.

It is appropriate to include CT scan evidence in the determination of whether Claimant suffers from complicated pneumoconiosis as other acceptable medical evidence under § 718.304(c).[7] Four of the five CT scan interpretations find the presence of simple CWP. However, there are not any findings of large opacities. I find that there is no evidence of large

[7]Numerous physicians testified that CT scan evidence is the most sensitive way to determine the presence of pneumoconiosis, but they would prefer to rely upon both x-ray and CT scan evidence to make a definitive diagnosis.

opacities present on the CT scans.

The eight interpretations of chest x-rays diagnosing the presence of large opacities provide probative evidence, which is entitled to significant weight based on the credentials of the interpreting physicians. Claimant has provided substantial evidence to support a finding of complicated pneumoconiosis. However, there is also substantial probative evidence weighing against the finding of large opacities. Employer has also adduced x-ray evidence that is at least entitled to an equivalent amount of weight when considering the number of interpretations and the qualifications of the physicians. In the face of the contrary x-ray evidence provided by Employer, which is supported by the more sensitive CT scan evidence, Claimant has not shown, by a preponderance of the evidence, that he suffers from complicated pneumoconiosis.[8] I find that Claimant has not established that he suffers from a chronic dust disease of the lung that yields one or more large opacities. Therefore, the irrebuttable presumption of § 718.304 does not apply. I find that no mistake in determination of a fact occurred when Claimant was determined to be entitled to rely upon the irrebuttable presumption arising from a diagnosis of complicated pneumoconiosis.

The Claimant has not specifically alleged any other mistaken determinations of fact. I have reviewed the decision and all of the evidence which was before Administrative Law Judge Hillyard. The evidence consisted of narrative opinions from Drs. Alhomsi, Jarboe, Dahhan, Fino, Wells, and Musgrave. Administrative Law Judge did not consider any x-ray evidence, nor was he presented with any new PFTs or ABGs. I found no mistake in determination of any fact in the prior proposed decision and order denying request for modification.[9]

Absent a mistake in a determination of fact, Claimant will only be entitled to modification if the newly submitted evidence establishes a change in conditions. Claimant has previously established the existence of pneumoconiosis, but was denied benefits under the Act because he was unable to establish total disability due to pneumoconiosis.

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[8]Section 718.304 does not allow for irrebuttable presumption of total disability to be established by narrative opinion evidence because it is not properly classified x-ray evidence, it is not biopsy or autopsy evidence, and it is not other means of diagnosing a chronic dust disease of the lung which would be a condition which could reasonably be expected to yield the results measured by x-ray, biopsy, or autopsy evidence (narrative opinion evidence cannot measure or approximate the size of opacities in order to determine if they are large opacities). As such, the voluminous narrative opinions submitted by Employer stating that Claimant does not suffer from complicated pneumoconiosis cannot be used as contrary probative evidence.

[9]I have determined that Claimant was engaged in coal mine employment for 23.94 years, while Administrative Law Judge Hillyard credited Claimant with 16 and ½ years. The additional years of coal mine employment that I credited Claimant with does not materially affect Claimant's entitlement. The additional years of coal mine employment do not permit Claimant to avail himself of any statutory presumption that would affect his entitlement to benefits under the Act. The finding of additional years of coal mine employment does not warrant a review of the entire record to determine the outcome of the claim on its merits.

Total Disability

To establish a change in conditions, Claimant must demonstrate that he was totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the five standards of § 718.204(b) or the irrebuttable presumption referred to in § 718.204(b). The Board has held that under Section 718.204(b), all relevant probative evidence, both "like" and "unlike" must be weighed together, regardless of the category or type, in the determination of whether the Claimant is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231 (1987). Claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

I have already determined that Claimant is not entitled to the irrebuttable presumption contained in § 718.304. Therefore, Claimant cannot establish total disability in reliance upon § 718.304.

Total disability can be shown under § 718.204(b)(2)(i) if the results of pulmonary function studies are equal to or below the values listed in the regulatory tables found at Appendix B to Part 718. There are three newly submitted pulmonary function studies. Neither of the three studies produced qualifying values. Therefore, I find that Claimant has not established total disability under subsection (b)(2)(i).

Total disability can be demonstrated under § 718.204(b)(2)(ii) by the results of arterial blood gas studies. There are three newly submitted arterial blood gas studies. Neither of the three studies produced qualifying values. Therefore, I find that Claimant has not established total disability under subsection (b)(2)(ii).

Total disability may also be shown under § 718.204(b)(2)(iii) if the medical evidence indicates that Claimant suffers from cor pulmonale with right-sided congestive heart failure. The record contains no evidence that Claimant suffers from this condition. Therefore, I find that Claimant has not established total disability under subsection (b)(2)(iii).

Section 718.204(b)(2)(iv) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that Miner's respiratory or pulmonary condition prevented Miner from engaging in his usual coal mine employment or comparable gainful employment. Miner held various underground and above ground mining positions for Employer, including shooting coal, running a shuttle car, dispatching, and general labor.

The exertional requirements of the claimant's usual coal mine employment must be compared with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a *prima facie* finding of total disability is made and the party

opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(b)(1). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988). Nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis. § 718.204(a); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (1994). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986).

Claimant did not adduce any new narrative opinion evidence regarding total disability. To the contrary, Employer submitted two narrative examination reports, sixteen consultative or supplemental reports, and the deposition testimony of four physicians who had previously issued narrative reports. The narrative opinion evidence submitted by Employer contained an unanimous opinion: Claimant does not have any respiratory or pulmonary impairment, and Claimant retains the respiratory capacity to perform his previous coal mine employment or similar arduous labor. All of the physicians relied upon normal pulmonary function values measured by PFT, and nearly normal oxygen diffusion measured by ABGs. These physicians reviewed substantial amounts of medical records, they set forth clinical observations and findings, and their reasoning was supported by adequate objective data. I find the opinions to be generally well-reasoned and well-documented. The credentials of these physicians entitles their opinions to enhanced probative weight.

The newly submitted evidence proffered by Employer amounts to a bewildering degree of cumulative and duplicative evidence. Specifically, multiple supplemental opinions rendered by physicians who have reviewed additional evidence, which usually consisted of other supplemental or consultative opinions, who then conclude that the new evidence does not cause them to change any of their opinions, are of little evidentiary value. They amount to a waste of judicial resources, unnecessary piling on of evidence, and at some point the duplicative effort reaches a point of diminishing returns. Claimant submitted no new narrative evidence to support a finding of total disability caused by a pulmonary or respiratory impairment. Employer has submitted voluminous, well-reasoned and well-documented narrative opinions that conclusively establish that Claimant is not totally disabled from a respiratory or pulmonary impairment and that Claimant retains the respiratory capacity to perform his previous coal mine employment or similar arduous labor.

Claimant has not established total disability under any applicable provision of § 718.204(b). I find that Claimant has not established an element of entitlement that was previously adjudicated against him. Therefore, I find that Claimant has not established a change in conditions warranting modification of Administrative Law Judge Hillyard's decision and order - denial of benefits.

Entitlement:

The Claimant, Fred Runyon, has failed to prove a mistake in determination of any fact or a change in conditions under § 718.310 by a preponderance of the evidence. Claimant has not proven that he suffers from complicated pneumoconiosis, nor has he established total disability. Therefore, Mr. Runyon is not entitled to benefits under the Act.

Attorney's Fees

An award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

ORDER

IT IS ORDERED that the claim of Fred Runyon for benefits under the Act is hereby DENIED.

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THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing notice of appeal with the Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601. **A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.**